

ADMINISTRATIVE APPEALS & CASE LAW UPDATE

Atty. Dean B. Richards
2015 WCCA Spring Conference

Today's Agenda

- Administrative Appeals
- Three New Cases
 - Prohibition of short-term rentals
 - Merger of nonconforming lots
 - Establishing a nonconforming use

An Attorney's Perspective on Appealing Your Decision



**Making you
bulletproof.**

Why would someone appeal your decision?

- They're dumb.
- Can't take no for an answer.
- Crap shoot.
- Forum shopping.
- First step in legal process (or interpretation).
- You were wrong.



Your job description does not include decision-making infallibility.

Format of Appeal

- Board of Adjustment is the appellate body.
- You return your record.
- Stay of Proceedings.
- Hearing

Format of Appeal

- De Novo or Error Determination?
 - Published notice
 - Reverse, affirm, or modify
 - May make determination as ought to be made
 - Shall have all of the powers of the officer from whom the appeal is taken.

Record

- “...all papers constituting the record upon which the action appealed from was taken.”
 - Application
 - Ordinances, Regulations, Statutes
 - Reports, photos or records
 - Your decision

Standard of Review

- De novo?
- Certiorari standards:
 - Kept within jurisdiction
 - Applied proper rule of law
 - Did not act in an arbitrary and capricious manner (will or judgment?)
 - Evidence supports decision

Bulletproofing

- Written decisions
- Factual determinations
- Ordinances or legal standards relied upon
- Link facts to ordinance

Bulletproofing Gold Stars

- Consistency
- Respect clear and unambiguous language
- Consistent with local policies
- Rules of Construction

Bulletproofing No-Nos

- “That’s the way we always do it.”
- “You know the chairman...”
- “Remember when he...”
- “We have a precedent...”

Heef Realty v. City of Cedarburg BOA

- February 4, 2015
- Court of Appeals - District 2
- Ozaukee County Case

Heef Realty v. City of Cedarburg BOA

- Short-term rental of homes in single family district
- Permitted Uses
 - Single-family dwellings

Heef Realty v. City of Cedarburg BOA

- Dwelling
 - any building or portion thereof designed or used exclusively as a residence and having cooking facilities, but not including boarding or lodging houses, motels, hotels, tents, cabins, or mobile homes.

Heef Realty v. City of Cedarburg BOA

- Board of Appeals
 - "Single Family" means occupant's established residence.
 - Differentiate between "Residential" and "Transient".
 - Look to voting requirements.

Heef Realty v. City of Cedarburg BOA

- Owner:
 - Long term rentals are allowed.
 - Ordinance does not have any time restrictions.

Heef Realty v. City of Cedarburg BOA

- Court:
 - Zoning ordinances are in derogation of the common law
 - Construe ordinances in favor of the free use of property
 - Any restriction on free use must be clear and unambiguous

Heef Realty v. City of Cedarburg BOA

- *Harding* case
 - Time share
 - One property, thirteen families, 4 weeks per year
 - One, single family staying at a time

Heef Realty v. City of Cedarburg BOA

- Ordinance does not require occupancy over a specified period of time.
- Look to the language of the ordinance: it is about the use of the property, not the duration of the use.
- Zoning Board cannot arbitrarily impose a time/occupancy restriction not adopted democratically by the city.

Heef Realty v. City of Cedarburg BOA

So,

when does occupancy of a single family residence become lodging?

Murr v. State and St. Croix County

- December 23, 2014
- Court of Appeals – District 3
- St. Croix County Case

Murr v. State and St. Croix County

- Regulatory merger of two adjacent, riparian lots
- Lot F – 1960 Cabin near river. Title held by Murr's plumbing company
- Lot E – 1963 Vacant lot.

Murr v. State and St. Croix County

- Lots bisected by 130-foot bluff
- Level at top and at river
- Combined, .98 acres of net project area

Murr v. State and St. Croix County

- Lots transferred from parents to kids
- Lot F in 1994
- Lot E in 1995
- Lots in common ownership following 1995 transfer

Murr v. State and St. Croix County

- Ordinance based upon NR 118 prohibits conveyance of abutting substandard lots held in common ownership.
- In prior case, Murr was denied a variance to flood proof cabin and sell Lot E separately.

Murr v. State and St. Croix County

- This case seeks compensation for inverse condemnation or a regulatory taking.
- Murr argues that the ordinance deprives them of all, or practically all of the use of Lot E because it cannot be sold separately.

Murr v. State and St. Croix County

- Taking is not just physical occupation.
- A taking can also occur if the gov't enacts a regulation that is so onerous that its effect is tantamount to a direct appropriation.

Murr v. State and St. Croix County

- MURR: Lot E serves no purpose and has no use because it cannot be sold.
- COURT: Don't segment property, look at its value as a whole.

Murr v. State and St. Croix County

- Valuation of whole parcel prevents payment of compensation for every incidental infringement of property rights.

Murr v. State and St. Croix County

- Combined property suffices as a single, buildable lot.
- Could build a year-round residence at top of bluff if the cabin is razed.
- Could build on Lot E, Lot F, or straddle both lots.

Walworth County v. West Rod Cottage Industries

- January 14, 2015
- Court of Appeals – District 2
- Walworth County Case

Walworth County v. West Rod Cottage Industries

- Failure to establish nonconforming use
- Tavern on Lake Beulah
- Boat and slip rental

Walworth County v. West Rod Cottage Industries

- Two parcels divided by road:
 - Tavern parcel adjacent to channel
 - Lake parcel includes cottage, garage and parking lot
 - Both lots have mooring areas

Walworth County v. West Rod Cottage Industries

- 1971 Shoreland Zoning Ordinance
- Tavern parcel = B-3 Waterfront business district. Boat rentals and boat liveries of ten or fewer boats permitted.
- Lake parcel = C-4 Lowland resource conservation district. Marinas not permitted.

Walworth County v. West Rod Cottage Industries

2012 – Citation issued for operating boat
marina/access site on lake parcel (C-4)

Walworth County v. West Rod Cottage Industries

Nonconforming Use

- Active and actual use predating ordinance
- Use has continued to present
- Burden on property owner
- Acquired “vested interest” in continuance

Walworth County v. West Rod Cottage Industries

- Rented boats since 1963
- Accepted cash to moor in the 1990s
- Customers could “park” boats at lake parcel while visiting the tavern
- Since 1981, moored boats, some with rental agreements
- When purchased, two people paying to moor boats

Walworth County v. West Rod Cottage Industries

Court finds:

- Maybe evidence of boat livery since 1971
- But insufficient evidence of marina operations
- Pre-ordinance marina activities were limited, occasional and sporadic



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